IN THE

Supreme Court of the United States

October Term, 1976

No. 76-114

JOSE SANTIAGO,

Petitioner,

—v.—

SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY, and BENJAMIN J. MALCOLM, Commissioner, New York City Department of Correction,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MAURICE BRILL,
291 Broadway,
New York, New York 10007.
Attorney for Petitioner.

TABLE OF CONTENTS

TABLE OF CASES

STATUTES CITED

IN THE

Supreme Court of the United States

October Term, 1976

No. .....

JOSE SANTIAGO,

Petitioner,

—v.—

SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY, and BENJAMIN J. MALCOLM, Commissioner, New York City Department of Correction,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Comes now Maurice Brill, attorney for Petitioner, and hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case entered April 28, 1976.

Opinions Below

The opinion of the Supreme Court of the State of New York, Kings County (Appendix "D", pp. 4-1-D-4 *infra*), is not reported. The opinion of the Supreme Court of the State of New York, Appellate Division,

Second Judicial Department (Appendix "E" *infra*), is reported at 49 App. Div. 2d 928 (2d Dept. 1975). The Memorandum and Order of the United States District Court for the Eastern District of New York (Appendix "F", pp. F-1-F-6 *infra*) and the Amendment to Memorandum and Order dated March 10, 1976 and Memorandum and Order Denying Application for Certificate of Probable Cause (Appendix "G", pp. G-1-G-2 *infra*) are not reported.

Jurisdiction

The order of the Court of Appeals denying a certificate of probable cause was entered April 28, 1976 (Appendix "H" *infra*). The jurisdiction of this Court is involved under 28 U.S.C. 1254(1).

Question Presented

Whether a certificate of probable cause should have been granted to hear the appeal of a petitioner for a writ of habeas corpus when his conviction resulted from a residential search authorized by a warrant, the supporting affidavit for which failed to furnish sufficient probable cause?

Statement

Petitioner, Jose Santiago, was indicted along with a co-defendant for the crimes of promoting gambling, possession of gambling records, possession of a weapon as a felony, criminal possession of stolen property, criminal possession of a forged instrument, and possession of a weapon as a misdemeanor.

The above charges resulted from the seizure of certain property by police officers who executed a search

warrant and thereafter arrested the Petitioner at premises 152—29th Street, Apartment 4B, Brooklyn, New York, on May 26, 1972. The search warrant (Appendix "A"), the affidavit (Appendix "B"), and return (Appendix "C"), are appended hereto.

Pursuant to petitioner's motion to controvert the search warrant and to suppress the seized evidence, a hearing was conducted before Hon. William T. Cowin, Judge of the Supreme Court, Kings County, on January 3, 1974.

At the conclusion of the hearing, decision was reserved. On April 3, 1974, the motion to controvert the search warrant and to suppress the evidence was denied by Judge Cowin in a written opinion (Appendix "D"). On the third page of said opinion, the Trial Court ruled as follows:

> "The statements contained in the affidavit and the testimony before this court made sufficient showing of probable cause to justify the issuance of the warrant * * *."

There is, of course, a strong implication that the Trial Court considered the hearing testimony in its determination of whether or not there was sufficient probable cause to sustain the issuance of the warrant. However, both Petitioner and the District Attorney have agreed that the propriety of the search and seizure effectuated in the present case may be tested solely on the sufficiency of the affidavit supporting the search warrant. *Spinelli* v. *United States*, 393 U.S. 410, 413 (1969); *Aguilar* v. *Texas*, 378 U.S. 108, 109 (1964); *Dumbra* v. *United States*, 268 U.S. 435, 441 (1925).

The sole issue, then, is whether or not the affidavit furnished sufficient probable cause for the search of Petitioner's residence.

Subsequent to the denial of Petitioner's motion to suppress the evidence, on April 5, 1974, he entered a plea of guilty to the crime of possession of a weapon as a felony, reserving his right to appeal on this question (§ 710.70 Criminal Procedure Law).

On May 23, 1974 Petitioner was sentenced to serve a six month term of imprisonment. A stay of execution was granted pending appeal and bail has been fixed in the sum of $5,000.00.

On October 20, 1975, the above judgment of conviction was affirmed by the Supreme Court of the State of New York, Appellate Division, Second Judicial Department (Appendix "E").

On November 11, 1975, further application for leave to appeal to the Court of Appeals was heard and denied by Hon. Charles D. Breitel, Chief Judge. Petitioner has thus exhausted his state remedies pursuant to Title 28 United States Code § 2254.

On January 26, 1976 a petition for a writ of habeas corpus was filed and on January 29, 1976 this cause came on for argument before the Federal District Court for the Eastern District of New York (Hon. Thomas C. Platt). On that date decision was reserved.

On March 10, 1976 the District Court issued a Memorandum and Order denying Petitioner's application for a writ of habeas corpus (Appendix "F"). The said Memorandum and Order was filed on March 12, 1976 and judgment was entered against the Petitioner on March 15, 1976.

On March 19, 1976 Petitioner applied to the District Court for a certificate of probable cause to enable him to perfect his appeal to the United States Court of Appeals for the Second Circuit.

On March 29, 1976 the District Court issued an "Amendment to Memorandum and Order Dated March 10, 1976 and Order Denying Application for Certificate of Probable Cause." (Appendix "G").

On April 1, 1976 Petitioner moved the United States Court of Appeals for the Second Circuit for a certificate of probable cause to enable him to appeal the District Court's ruling which denied his application for a writ of habeas corpus. Petitioner alleged that the District Court committed both factual and legal errors in its decision. On April 28, 1976 the United States Court of Appeals for the Second Circuit denied Petitioner's motion (Appendix "H").

ARGUMENT

A certificate of probable cause should have been granted to hear the appeal of a petitioner for a writ of habeas corpus when his conviction resulted from a residential search authorized by a warrant, the supporting affidavit for which failed to furnish sufficient probable cause.

Under the Fourth Amendment, a judicial officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough. *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Nathanson* v. *United States*, 290 U.S. 41 (1933); *People* v. *Politano*, 17 App. Div. 2d 503, 235 N.Y.S. 2d 712 (3rd Dept. 1962), *aff'd.* 13 N.Y. 2d 852, 242 N.Y.S. 2d 491 (1962).

It is with this accepted principle of law that we must begin in determining whether the present affidavit contained a sufficient showing of probable cause to issue a

search warrant for Petitioner's dwelling. Close scrutiny of the affidavit itself (Appendix "B") is thus required.

Examination of the officer's affidavit must be fixed upon the second paragraph, which contains the substance of the allegations therein. This paragraph contains an introductory sentence stating the officer's conclusions and five alleged personal observations.

Under the law, of course, aside from furnishing an introduction, the conclusions provided in the first sentence furnished little else of value. *Aguilar* v. *Texas, supra; Nathanson* v. *United States, supra.* Furthermore, the language alluding to "an official communication," without more (and no further elaboration is thereafter offered), provides no evidence of probable cause to the examining magistrate. See *Giordenello* v. *United States,* 357 U.S. 480 (1958) and *Aquilar, supra,* at 112-114 (note 4). Cf. *People* v. *Corrado,* 22 N.Y. 2d 308, 314 (note 4) (1968).

It is the officer's personal observations which provide the underlying facts and circumstances upon which the present affidavit must stand or fall. Under these observations the warrant to search Petitioner's dwelling must be based. These observations may be summarized as follows:

a) On May 18, 19, 22 and 23, 1972, between 2:15 and 3:00 P.M., Petitioner was seen receiving what appeared to be white slips of paper and/or U.S. currency from an unidentified individual in the vicinity of Second Street in Brooklyn, New York.

b) On the aforesaid May 18th, 19th and 22nd, Petitioner's automobile was, at some unknown time thereafter, observed to be parked on 29th Street.

c) On the aforesaid May 23, 1972, Petitioner was thereafter observed to enter a building known as 152 29th Street.

d) Petitioner was observed leaving Apartment 4B of said premises (152 29th Street) at 2:10 P.M. and returning thereto at 3:10 P.M. on May 25, 1972, when no other observations of Petitioner were made. A female alleged to be "participating in this gambling activity" entered this apartment and departed between 3:20 and 3:25 P.M. on that date.

Have the "probable cause" requirements for search of his dwelling thus been fulfilled? It is respectfully submitted that an affirmative answer would establish a dangerously broad precedent in the area of house searches.

Looking first to general principles, Petitioner does not question established propositions to the effect that affidavits of probable cause are tested by much less rigorous standards than those governing admissibility of evidence at trial, *McCray* v. *Illinois,* 386 U.S. 300, 311 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, *United States* v. *Ventrasca,* 380 U.S. 1082, 108 (1965); and that the magistrate's determination of probable cause should be paid great deference by reviewing courts, *Jones* v. *United States,* 362 U.S. 257, 270-271 (1960). However, there are some warrants which cannot be sustained without diluting important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry. *Spinelli* v. *United States, supra.*

As a further general principle, we are concerned with the question of whether there were reasonable grounds, at the time of the affidavit and the issuance of the warrant, for the belief that the law was being violated on the premises to be searched. *Dumbra* v. *United States, supra; Aguilar* v. *Texas, supra; Rice* v. *Wolff,* 531 F.2d

1280, 1285 (8th Cir. 1975), *rehearing denied* 1975 *cert. granted* 1975; *People* v. *Marshall*, 13 N.Y. 2d 28, 35 (1963). We also know that it cannot follow in all cases, simply from the existence of probable cause to believe a suspect guilty, that there is also probable cause to search his residence. *United States* v. *Lucarz*, 430 F.2d 1051, 1055 (9th Cir. 1970); *United States* v. *Bailey*, 458 F.2d 408, 412 (9th Cir. 1972); *Lowrey* v. *United States*, 161 F.2d 30 (8th Cir. 1947).

Of course, cases citing general principles in this area are persuasive only to the degree that they present facts similar to those now before the Court. We, therefore, confine ourselves to an examination of similar cases.

In variably, judicial approval of a residence search in gambling cases such as the instant one, has depended upon the existence of some nexus between the premises and th gambling activity. This has been established by showing a recurring pattern of conduct at the premises or some action on the premises itself sufficient to negate inferences of innocent activity.

Perhaps the clearest situations are those involving actions occurring on the premises themselves which provide ample cause for the warrant's issuance. These situations often arise upon the receipt of confidential information indicating that the premises are being employed for gambling purposes. See for example, *United States* v. *Woodson*, 303 F.2d 49 (6th Cir. 1962); *Washington* v. *United States*, 202 F.2d 214 (D.C. Cir. 1953); *United States* v. *Joseph*, 174 F. Supp. 539 (D.C. Ed. Penn. 1959), *aff'd.* 278 F.2d 504 (3rd Cir. 1960), *cert. den.* 364 U.S. 823, (1960); *Wyche* v. *United States*, 193 F.2d 703 (D.C. Cir. 1951).

This confidential information is often corroborated by personal observations of the investigating authorities.

Thus, in *People* v. *Smith*, 21 N.Y. 2d 698 (1967) the officer personally observed a number of persons knock on the door of the suspected premises, and, after short conversations with the defendants, hand money to either of them. In *People* v. *Misuraco*, 16 N.Y. 2d 542 (1965) the same general pattern of personal observations by the officer at the suspected premises was shown (i.e.: repeated visits by persons who, after knocking on the door, handed one of the defendants envelopes and money). Cf. *People* v. *Pena*, 18 N.Y.S. 2d 837 (1966); *People* v. *Marshall*, 13 N.Y. 2d 28, 33 (1963); *People* v. *Massey*, 238 N.Y.S. 2d 531, 536 (App. Term 2nd Dept. 1963).

A further accepted indication of gambling activity existent at the premises is the use of telephones at the suspect premises to conduct this type of activity, *Washington* v. *United States, supra; Smith* v. *State*, 191 Md. 329, 62 A.2d 287; or to contact other known gamblers, *Clay* v. *United States*, 246 F.2d 298 (5th Cir. 1957), *cert. den.* 355 U.S. 863 (1957); *United States* v. *Gorman*, 208 F. Supp. 747 (D.C. Mich. 1962).

An additional factor considered by the courts in determining the validity of a search warrant for a particular premises is the identity of its occupants. Previous arrests or convictions for gambling of the owner or of others connected with the premises, or classifications such as "known gambler" or "gambling operator" (see *Clay* v. *United States, supra; Washington* v. *United States, supra; People* v. *Misuraco, supra;* and *United States* v. *Moriarity, infra* at 11) may well be thrown into the "probable cause" balance—always, however, with the full understanding that probable cause to believe a suspect guilty of gambling may not, in and of itself, provide probable cause to search his residence. See *United States* v. *Lucarz, supra*, at 1055; *United States* v. *Bailey, supra*, at 412, and *Lowrey* v. *United States, supra.*

Where the affidavit does not show actual gambling activity at the residence to be searched, it must show the existence of a pattern of conduct in connection with the premises sufficient to negate inferences of innocent activity.

Examples of such patterns of conduct may be found where the suspect (usually a known gambler) follows a regular pattern of picking up numbers and returning home thereafter, and sometimes leaving home again for the purpose of transferring the gambling material to another. It is the pattern that connects the gambling activity with the premises which makes the search reasonable. See *Clay* v. *United States*, 246 F.2d 298 at 304 (5th Cir. 1957); *United States* v. *Bell*, 126 F. Supp. 612, at 615 (D.C. D.C. 1955), *aff'd.* 240 F.2d 37 (D.C. Cir. 1957); *People* v. *Coscia*, 26 App. Div. 2d 649, 272 N.Y.S. 2d 416 (2nd Dept. 1966). Cf. *United States* v. *Moriarity*, 327 F.2d 345 (3rd Cir. 1964) where the approval of a residence search was heavily dependent upon the defendant's activity pattern. In that case, a well known gambler followed the same regular pattern leading to the same residence which yielded gambling material in a previous search conducted ten months prior to the present arrest. The gaps in the agents' observations in that case were reasonably filled in by the identity of the suspect and his identical method of functioning with the same headquarters only ten months before. The court, of course, made a point of stressing that the charge against him was "much less subject to scepticism than would be such a charge against one without such a history."

In contrast to the cases cited hereinabove, it seems clear that the courts have disapproved residence searches based solely on the fact that known gamblers visited the premises. Without a showing of some nexus between the premises and the gambling activity itself, the warrant has been invalidated.

United States v. *Price*, 149 F. Supp. 707 (D.C. D.C. 1957) is a typical case in point. There the officers had obtained clear proof of numbers activity by placing wagers with a writer at a certain address and then following him to another address on seven out of eight days. The court granted a motion to suppress evidence obtained under a search warrant for the second address. In arriving at its conclusion, the Court stated as follows (at 709):

> "The Court is convinced that the affidavit does not establish 'probable cause' for the issuance of a search warrant for premises 1445 Swann Street, N.W. This is not a case in which groups of known or suspected numbers operators collected at the premises, as in Woods v. United States, 99 U.S. App. D.C. 351, 240 F.2d 37, affirming Bell v. United States, D.C. 1955, 126 F. Supp. 612 in this respect. Nor is it a case in which groups of people arrived at the premises with bulging pockets or carrying paper bags and left soon thereafter with empty pockets and unencumbered by bags, as in Wyche v. United States, 1951, 90 U.S. App. D.C. 67, 193 F.2d 703, certiorari denied 342 U.S. 943, 72 S. Ct. 556, 96 L. Ed. 702. Nor is it a case in which the police, having reliable information that the premises were being used illegally, conducted an investigation as to those premises, by telephoning there on several occasions and receiving numbers information from a man previously identified to them as a numbers operator, as in Washington v. United States, 1953, 92 U.S. App. D.C. 31, 202 F.2d 214, certiorari denied 345 U.S. 956, 73 S. Ct. 938, 97 L. Ed. 1377.

In the instant case the police received no reliable information as to the premises, conducted no surveillance or investigation thereof with the exception of determining the owner, and in fact, ob-

served nothing suspicious about the premises. So far as the affidavit indicates and so far as the Court is aware, the police investigation was limited strictly to the activities of one numbers writer, and even that investigation did not disclose any observable evidence that that writer was obtaining from, or depositing at, the premises any numbers material whatsoever.

It is the Court's view that the regular visiting of a private dwelling by one numbers writer, even during the hours described, does not in and of itself establish that degree of 'probable cause' necessary to secure a search warrant for that establishment. This Court could not hold that such visits alone provide 'probable cause' to believe that illegal material is concealed on those premises. Nor is the added factor of ownership of the premises by an individual twice arrested for numbers operations years ago sufficient to vary that rule. The constitutional safeguards which insure the privacy of homes against invasion by government officials compel a higher standard of 'probable cause' than has been demonstrated in this case. * * *"

Cf. *United States* v. *Johnson*, 113 F. Supp. 359 (D.C. D.C. 1953); *United States* v. *Hall*, 126 F. Supp. 620 (D.C. D.C. 1955); *United States* v. *Dixon*, 334 F.2d 322 (6th Cir. 1964); *In Re Calandra*, 332 F. Supp. 737, 743-744 (D.C. N.D. Ohio 1971).

It may be noted, at this juncture, that nothing in the present affidavit alleges ownership of the subject premises by Petitioner, Santiago. It would thus appear that the present case (in which Petitioner was seen returning to the apartment building on one occasion after allegedly

accepting a wager) presents less probable cause for the residential search than did the *Price*, *Johnson* or *Hall* cases, *supra*.

People v. *Fino*, 14 N.Y. 2d 160 (1964) also bears significantly upon the present situation. There, the New York Court of Appeals considered an affidavit for a search warrant which stated that several allegedly known bookmakers entered a private dwelling carrying large envelopes on consecutive dates during normal bookmaking hours. The affidavit further alleged that two unlisted telephones were located on the premises. No activity on the premises was alleged to have occurred.

The Court of Appeals, citing *People* v. *Marshall*, *supra*, reversed the judgment of conviction solely because the quantum of proof necessary for a showing of probable cause to warrant the issuance of a search warrant was lacking. Finding that the police observations did not rise above a bar suspicion that the crime of bookmaking was being committed on the premises, the Court stated as follows (at pp. 163-164):

> "In cases involving substantially similiar facts, viz., observation of known bookmakers entering a private dwelling wherein several telephones were located, the courts have consistently held that such a showing was not sufficient to establish probable cause (see, e.g., United States v. Gebell, D.C., 209 F. Supp. 11; United States v. Bosch, D.C., 209 F. Supp. 15; United States v. Betz, D.C., 205 F. Supp. 927; United States v. Price, D.C., 149 F. Supp. 707; United States v. Johnson, D.C., 113 F. Supp. 359; cf. the following cases in which probable cause was found to have been established where, in addition to observations of known gamblers entering certain premises wherein several telephones were located (only one in Smith), it was

shown that a bet had been placed by calling a telephone number *at the premises* (Smith v. State, 191 Md. 329, 62 A.2d 287, 5 A.L.R. 2d 386); or that there was reliable confidential information of gambling activities *on the premises* (United States v. Woodson, 6 Cir. 303 F.2d 49) or that the telephones *on the premises were frequently being used to contact other known gamblers* (Clay v. United States, 5 Cir. 246 F.2d 298, cert. den. 355 U.S. 863, 78 S. Ct. 96, 2 L. Ed. 2d 69; United States v. Gorman, D.C., 208 F. Supp. 747). The search warrant issued here, then, was invalid. It follows, therefore, that the evidence seized pursuant thereto was illegally obtained and thus inadmissible (People v. Politano, 17 A.D. 2d 503, 504, 235 N.Y.S. 2d 712, 713, affd. 13 N.Y. 2d 852, 242 N.Y.S. 2d 491, 192 N.E. 2d 271)." (Emphasis supplied.)

It is finally to be noted that, in requiring some nexus between the premises and the gambling activity, the courts have not been satisfied with a single occurrence at the premises to establish this nexus. See, for example, *United States* v. *Donlon*, 334 F. Supp. 1272 (D.C. Del. 1971); *In Re Calandra*, *supra*, at 743; *United States* v. *Dixon*, *supra*, at 324. A pattern of such activity has always been required by the Court for a finding of probable cause sufficient to issue a residence search warrant in a gambling case.

It may be seen from the above that probable cause to search the premises named in the present petition was clearly lacking. Despite the length of the officers' affidavit, it is lacking in quality. Petitioner was not a "known gambler" and there is no mention of any gambling activity, past or present, at the residence in question. Observations which trace a suspected gambler to

an apartment building on *one* occasion after allegedly accepting a slip and currency do not provide the requisite probable cause to search the premises. On no occasion have the courts remotely approved a dwelling search based upon an affidavit such as the instant one.

As mentioned above, it is conceded that the law places a good deal of reliance upon the Magistrate's common sense in issuing a search warrant. However, it should be remembered that certain historical considerations dating back to colonial times also enter the picture, especially in cases of a residence search. In such cases, the element of "reasonableness" has been subjected to close scrutiny. Thus, in a case involving stolen property it may well be reasonable for a Magistrate to assume that the suspected thief has hidden the stolen merchandise in his home. This assumption does not necessarily and reasonably follow, however, in gambling cases. (See *United States* v. *Donlon*, *supra*, at 1275, for example). It is just as reasonable to believe that a gambler conducts his business and or maintains his records, slips, etc., at other premises as it is to presume that he operates from his own home. For this reason, when there has been a failure to show some particular nexus between the gambler's activities and his residence, the warrant has not been upheld. It should not be upheld in the present case.

CONCLUSION

For the reasons above stated, requisite probable cause for the within search was lacking and a certificate of probable cause should have been granted. The petition for the writ of certiorari should be granted.

Respectfully submitted,

MAURICE BRILL,
291 Broadway,
New York, New York 10007.
Attorney for Petitioner.

APPENDIX

APPENDIX "A"

Search Warrant Issued May 26, 1972

Criminal Court of the City of New York
Part 1A, County of Kings C 257

In the name of the People of the State of New York:

To any peace officer in the City of New York.

Proof by affidavit (or deposition) having been made this day before me by Patrolman Nicholas G. Triglianos, # 26594, Brooklyn South and Richmond Public Morals District that there is probable cause for believing that certain property, written records, writings, and other paraphernalia used to accept, receive and record mutuel racehorse policy bets in violation of sections 225.05, and 225.15/2 Penal Law of the State of New York. By receiving mutuel racehorse bets in apt 4B at 152—29th St.. By John Doe, male, white, hispanic, 30-35 yrs, 5′ 6″ 150 lbs., wearing glasses.

You are therefore commanded, between 9:00 A.M. and 9:00 P.M. to make an immediate search of 152—29th Street, Apartment # 4B Brooklyn, 3 flights of stairs first landing from the roof occupied by John Doe, Male, White, Hispanic, approximately 30-35 years, 5′6″, 150, wears glasses and of the person of John Doe (described above) male, white, hispanic, approximately 35 years, 5′6″, 150 lbs, wearing glasses at or near 152—29th St., Brooklyn, N.Y. for the purpose of committing a crime in violation of sections 225.05 and 225.15/2 Penal Law, of the State of New York and if you find any such property or any part thereof to bring it before me at Part 1A at 120 Schemerhorn Street, Brooklyn, N.Y.,

Dated at New York City,
May 26th, 1972
11:40 A.M.

MORGAN E. LANE
J.C.C.

APPENDIX "B"

Affidavit in Support of Search Warrant

C 257

CRIMINAL COURT OF THE CITY OF NEW YORK

Part 1A, County of Kings

State of New York)
County of Kings) ss.:

Patrolman Nicholas G. Triglianos, #26534, Brooklyn South & Richmond P.M.D., being duly sworn, deposes and says:

1. I am a Police Officer, assigned to Brooklyn South & Richmond P.M.D., Plainclothes Duty, City of New York, Police Department.

2. I have information based upon, and in connection with an official communication, received at this command, and personal observations, made by Deponent, which revealed that John Doe, Male, White, Hispanic, Approximately 30-35 Years, 5'6", 150 lbs., wears glasses, is accepting and receiving mutuel racehorse policy bets at various locations in Brooklyn, as indicated below, and after said transactions subject would go to premises 152—29th Street, Brooklyn, and enter Apartment #4B. On Monday, May 18, 1972, from approximately 1450 to 1520 hours, deponent had subject under observation, alone, in a 1972 Chevrolet, License #3Z9504, entering 2nd Street, between 4th & 5th Avenues. Subject stopped at 333—2nd Street, picked up an unknown male, drove to 1st Street, between 4th and 5th Avenues and parked said vehicle. Deponent observed subject accept an unknown amount of U.S. Currency in bill form, and also an unknown of white slips of paper, from said unknown

male. Subject then drove his vehicle back to 333—2nd Street and dropped of the unknown male. Deponent discontinued observation at this time. Deponent, upon returning to his District Office, at 830—4th Avenue, he observed the above mentioned vehicle parked on 29th Street, between 4th and 5th Avenues. Deponent had previously observed subject entering premises 152—29th Street, Apartment #4B. On Friday, May 19, 1972, from approximately 1415 to 1540 hours, deponent again had subject under observation, in the aforementioned vehicle, enter 2nd Street, between 4th and 5th Avenues, and again picked up the aforementioned unknown male at 333—2nd Street. Subject proceeded to 1st Street, between 4th and 5th Avenues, parked vehicle and were engaged in conversation. The unknown male, did hand something to subject, which he did accept, however, deponent was unable to identify same. Deponent discontinued observation, and upon returning to his District Office, again observed subject's vehicle parked on 29th Street, between 4th and 5th Avenues.

On Monday, May 22, 1972, from approximately 1420 to 1510 hours, deponent again observed Subject, in a 1972 Plymouth, License 72Z574, leased from Avis Rental Service to one Pedro Santiago, on May 20, 1972, when he returned vehicle mentioned above. Subject observed on 2nd Street, between 4th and 5th Avenues, proceeded to 333—2nd Street, parked said vehicle, exited, and went into hallway of said premises. The unknown male, as mentioned above, met subject in said hallway, and after a brief conversation, did hand subject a white slip of paper, which he did accept, left premises, entered his vehicle, and drove off. Deponent discontinued observation, and upon returning to his District Office, observed subject's vehicle parked on 29th Street, between 3rd and 4th Avenues.

Appendix "B"—Affidavit in Support of Search Warrant

On Tuesday, May 23, 1972, from approximately 1420 to 1510 hours, deponent again had subject under observation in a 1972 Plymouth, License #72Z574, driving on 2nd Street, between 4th and 5th Avenues. Subject parked his vehicle on street, in front of 333—2nd Street, and stayed in his auto. A few moments later, the unknown male, mentioned in the three aforementioned observations, emerged from said premises, approached Subject's vehicle, opened the door, and did hand Subject a white piece of paper which was rolled; which subject did accept, and drove off. Subject proceeded to 4th Avenue, and while waiting for a Green Signal Light, was observed by deponent counting and unknown amount of U.S. Currency, in bill form. Subject was then tailed to premises 152—29th Street, parked his vehicle in vicinity thereof, and entered said premises.

On Thursday, May 25, 1972, from approximately 1345 hrs to 1415 hrs, the Deponent observed the premise of 152—29 st. from the roof landing. At 1410 hrs the Deponent observed the subject exit apt. 4B and go down the stairs. Deponent then went to the roof of 152—29 street and observed the subject enter his vehicle, 72Z754 and drive away. At 1500 hrs to 1525 hrs the Deponent observed the premise of 152—29 street from the roof. At 1510 hrs, the Deponent observed the subject exit his auto, 72Z574, which he parked on 29 street between 4 ave and 3 ave. Deponent then went to the roof landing and observed the subject come up the stairs and enter apt. 4B. At approximately 1520 hrs the Deponent observed a female, white, Hispanic, also enter apt. 4B. Said female is known to the Deponent as participating in this gambling activity. Deponent observed the same female exit the apt. 4B at 1525 hrs.

Appendix "B"—Affidavit in Support of Search Warrant

3. Based upon the foregoing reliable information and upon my personal knowledge there is probable cause to believe that such property is contained therein to violate the gambling laws of the State of New York, namely sections 225.05 and 225.15/2 of the Penal Law, and may be found in the possession of John Doe (described above) or at premises 152—29th Street, Apartment #4B Brooklyn.

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, in the form annexed, authorizing the search of John Doe (described above) and premises described and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

No previous application in this matter has been made in this or any other court or to any other judge, justice or magistrate.

Nicholas G. Triglianos,	26534	Ptl	BS&RFMD
Police Officer	Shield	Rank	Command

Sworn to before me
May 26, 1972
Morgan E. Lane
Judge
11:40 A. 7

APPENDIX "C"

Return on Search Warrant

CRIMINAL COURT OF THE CITY OF NEW YORK

Part 2A, County of Kings

State of New York)
County of Kings) ss.:

Inventory made publicly taken by the undersigned, under and pursuant to the annexed warrant:

23 Slips Bearing Approx. 2,876 ? ? ? ? bets totaling approx. $2,280.00

37 Controllers Slips totaling $31,632.00 in bets

90 Bolita slips

65 PR lottery slips

16 Writing pads

17 Carbons

10 White sheets of paper

10 Blank M.V. Driver's License Documents

2 Typed M.V. Drivers License Documents

3 Controller Ribbons

1 38 Cal. Revolver #37344

1 9mm Automatic

69 38 Cal Live Rounds

12 .357 magmum Live Rounds

0 380 256r Automatic rounds

1 U.S. Currency

1 I.B.M. Elec. Typewriter #40454774

Appendix "C"—Return on Search Warrant

1 Commodorn adding machine (elec.) #84782 w/
1 Ribbon

I, Nicholas Triglianos, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.

Nicholas G. Triglianos	26534	Ptl.	BS&R FMD
Name	Shield	Rank	Command

Sworn to before me,
May 31, 1972

.....
Judge

APPENDIX "D"

Opinion of the Supreme Court of the State of New York, Kings County

SUPREME COURT

KINGS COUNTY

(Criminal Term, Part 22)

By COWIN, *J.*

Dated April 3, 1974

PEOPLE OF THE STATE OF NEW YORK

—vs.—

AUREA REYES and JOSE SANTIAGO

MEMORANDUM

This is a motion brought pursuant to CPL 710.20 subd. 1 to controvert a search warrant and to suppress certain tangible evidence.

The affidavit attached to the search warrant states that on Thursday, May 18, 1972, from 2:50 P.M. to 3:20 P.M., defendant Santiago was observed in a 1972 Chevrolet. He picked up an unknown male at 333—2nd Street, Brooklyn and drove to another point and parked. The affiant saw the unknown man pass an amount of currency and white slips of paper to the defendant Santiago. They then returned to 333—2nd Street, where the defendant dropped off the unknown male. Affiant states he had previously observed defendant Santiago entering premises 152—29th Street, apartment 4B, where the defendant resides.

Appendix "D"—Opinion of the Supreme Court of the State of New York, Kings County

On Friday, May 19, 1972, from 2:15 to 3:40 P.M., the affidavit states that the defendant was under observation and during that time he picked up the same unknown male at 333—2nd Street; said unknown male was seen to pass something to the defendant, which affiant was unable to identify.

On Monday, May 22, 1972, defendant was observed parked at 333—2nd Street, where he entered the hallway and the same unknown male handed him a white slip of paper. Defendant then returned to his car and drove off.

On Tuesday, May 23, 1972, defendant was observed parked at 333—2nd Street. The same unknown male emerged from 333—2nd Street, opened the door of the defendant's vehicle and handed him a white rolled piece of paper. Defendant then drove off. When his car was later stopped for a red light, defendant was observed counting an unknown amount of currency. Defendant then proceeded to premises 152—29th Street, which he entered.

On Thursday, May 25, 1972, at 2:10 P.M., defendant was seen leaving his apartment 4-B at 152—29th Street. He drove off in his automobile and returned at 3:10 P.M. Shortly thereafter, a white female was seen to enter the apartment. At the hearing, it was brought out that the female mentioned in the affidavit was not the female Aurea Reyes, presently a defendant in this case. Further, the first time the officer observed the defendant Aura Reyes was when she admitted him to Apt. 4-B at 152—29th Street, with the search warrant.

At the hearing, the police officer who was trained in gambling activities, testified that on dates specified in

the affidavit he observed the defendant Santiago leave Apt. 4-B at 152—29th Street, enter his car, drive to 333—2nd Street, meet with John Doe, receive slips of paper and money in bill form from John Doe and then return to 152—29th Street, Apt. 4-B. The names of Santiago and Reyes appeared on letter box marked 4-B at said address.

The issue in this case is whether the affidavit upon which the search warrant was granted contained the quantum of proof required for showing probable cause which "exists when there is reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious man in the belief that the law is being violated on the premises to be searched. (*Carroll* v. *United States*, 267 U.S. 132; *Dumbra* v. *United States*, 268 U.S. 435; *Aderhold* v. *United States*, 132 F.2d 858)." [*People* v. *Marshall*, 13 N.Y. 2d 28, 34 . . .; *People* v. *DiCarlo*, 43 A.D. 2d 797].

The statements contained in the affidavit and the testimony before this court made sufficient showing of probable cause to justify the issuance of the warrant (*People* v. *Smith, et al.*, 21 N.Y. 2d 698).

This court is aware of the decision in *People* v. *Garafolo* (N.Y.L.J., 3/29/74, 2nd Dept.) In evaluating the testimony of this police officer, this court is of the opinion that the testimony was not patently altered to nullify constitutional objections, nor was the evidence adduced such that the interests of justice would necessitate its nullification. While there was contradiction in the officer's testimony, it was *not* of such importance that common knowl-

edge and common sense would dictate a contravention of the search warrant.

Counsel for the defendant makes much of the fact that there were conversations had between the police officer and the judge at the time of the signing of the warrant. However, there is nothing in the record to disclose the text of such conversation.

The motion to controvert the search warrant and to suppress the evidence seized pursuant thereto is accordingly denied.

.....

J.S.C.

APPENDIX "E"

Opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

A/mc

—— A.D. 2d ——
1706 E

THE PEOPLE, etc.,

Respondent,

—v.—

JOSE SANTIAGO,

Appellant.

Brill & Nashman, New York, N.Y. (Maurice Brill of counsel), for appellant.

Eugene Gold, District Attorney, Brooklyn, N.Y. (Elliott Schulder of counsel), for respondent.

Appeal by defendant from a judgment of the Supreme Court, Kings County, rendered May 23, 1974, convicting him of possession of a weapon and dangerous instrument and appliance, as a felony, upon his plea of guilty, and imposing sentence. The appeal brings up for review a decision of the same court, dated April 3, 1974, which denied defendant's motion to suppress evidence seized pursuant to a search warrant.

Judgment affirmed.

In our opinion the determination of the suppression motion is governed by the decisions in People v. Hansen (47 A.D. 2d 545), People v. Coscia (26 A.D. 2d 649), People

Appendix "E"—Opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

v. Valentine (17 N.Y. 2d 128) and People v. Smith (21 N.Y. 2d 698). People v. Fino (14 N.Y. 2d 160), upon which appellant relies, is inapposite. There the police merely observed several alleged bookmakers enter a private dwelling in which there were two unlisted telephones. They had nothing further upon which to base their claims that bookmaking was being carried on in the premises. A reading of the affidavit upon which the search warrant was issued in this case in a "common-sense and realistic fashion", as opposed to a "hypertechnical" manner, demonstrates that it is sufficient (United States v. Ventresca, 380 U.S. 102, 108, 109).

LATHAM, Acting *P.J.*, COHALAN, BRENNAN, MUNDER and SHAPIRO, *JJ.*, concur.

October 20, 1975 PEOPLE v. SANTIAGO, JOSE

APPENDIX "F"

Memorandum and Order of the Federal District Court for the Eastern District of New York dated March 10, 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

76 C 160

JOSE SANTIAGO,

Petitioner,

—against—

SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY and BENJAMIN J. MALCOLM, Commissioner, New York City Department of Correction,

Respondents.

March 10, 1976

PLATT, *D.J.*

Petitioner seeks a writ of habeas corpus pursuant to Title 28 United States Code Section 2241, and alleges that he has exhausted his opportunities for relief from the State Courts, his application for leave to appeal to the Court of Appeals from an adverse affirmance of his judgment of conviction from an adverse affirmance of his judgment of conviction having been heard and denied by Chief Judge Charles D. Breitel on November 11, 1975 (see Title 28 U.S.C. § 2254).

In the State Courts petitioner unsuccessfully sought to controvert a search warrant and suppress evidence (Criminal Procedure Law § 710.20(1)) and thereafter

pleaded guilty to the crime of possession of a weapon as a felony, but at the same time preserved his right to appeal under Criminal Procedure Law § 710.70. On May 23, 1974, petitioner was sentenced to serve a six month term of imprisonment and was scheduled to surrender to the Supreme Court, Kings County, on February 18, 1976, for service of said sentence.

In this Court petitioner claims that no probable cause was given to the Judge of the Criminal Court of the City of New York who issued the warrant to search premises known as 152—29th Street, Apartment 4B, Brooklyn, New York, and that the subsequent search pursuant thereto was in violation of his rights under the Fourth Amendment of the United States Constitution.

The affidavit on which the warrant was issued states that the affiant Police Officer had information based upon an "official communication" and personal observations made by him which revealed that petitioner was accepting and receiving mutual race horse policy bets at various locations in Brooklyn and that after said transactions subject would go to the premises in question and enter apartment 4B.

Specifically, the affiant stated in the affidavit that on Monday, May 18, 1972, from 2:50 PM to 3:20 PM he observed petitioner in a 1972 Chevrolet; that petitioner stopped at 333—2d Street and picked up an unknown male, drove to 1st Street between Fourth and Fifth Avenues and parked his vehicle. The affiant said that he then saw petitioner accept an unknown amount of U.S. currency in bill form and also an unknown amount

of white slips of paper from the unknown male. He then observed petitioner and the unknown male when they returned to 333—2d Street where the unknown male left the car. Thereafter, the affiant stated, he saw petitioner's vehicle parked on 29th Street between Fourth and Fifth Avenues, having previously observed petitioner entering premises 152—29th Street, Apartment 4B.

The affidavit further states that on Friday, May 19, 1972, from 2:15 to 3:40 PM the Police Officer observed the petitioner drive to 333—2d Street in the same car and again pick up the same unknown male, and that he observed them proceed to First Street between Fourth and Fifth Avenues and park the vehicle, where after a conversation the unknown male handed something to the petitioner. Thereafter, the officer observed the petitioner's vehicle parked on 29th Street between Fourth and Fifth Avenues.

On Monday, May 22, 1972, petitioner, in an Avis Plymouth, was observed proceeding to 333—2d Street, parking the rented car, leaving the same, and going into a hallway where he met the unknown male and received a white slip of paper. Thereafter, the petitioner left the premises, entered the vehicle, and drove off. Again the vehicle was later seen parked on 29th Street, between Third and Fourth Avenues.

The affidavit further states that on Tuesday, May 23, 1972, from 2:20 to 3:10 PM petitioner was observed in the same vehicle parking in front of 333—2d Street where he was joined by the same unknown male and handed a white piece of paper and that thereafter, while petitioner

was waiting for a green traffic light, he was seen counting an unknown amount of U.S. currency in bill form. He was then followed to premises 152—29th Street where he parked the vehicle and entered the premises.

The affidavit further states that on Thursday, May 26, 1972, at 2:10 PM petitioner left apartment 4B, went downstairs, and entered the vehicle. At 3:10 PM petitioner returned, parked the vehicle on 29th Street between Fourth and Third Avenues, and entered the premises and and in particular Apartment 4B. Ten minutes later the officer observed "a female, white, Hispanic, also enter Apartment 4B. Said female is known to the deponent as participating in this gambling activity. Deponent observed the same female exit Apartment 4B at 1525 hrs."

Petitioner relies principally upon *United States* v. *Price*, 149 F. Supp. 707 (D.D.C. 1957), which he says presents a much stronger case for the denial of a motion to suppress than the case at bar and in which such a motion was granted. Each case, however, must rise or fall on its own facts and there are several distinguishing features between the *Price* case and this case.

In this case on four separate occasions the petitioner was observed by a Police Officer to have returned to his place of residence after conducting a gambling transaction. Immediately after leaving his residence, at approximately the same time each day, petitioner was observed visiting the 2d Street address, engaging in a gambling transaction, and then returning. Each time he followed the same pattern. After another trip he was joined by a known gambler in his apartment for a long

enough period of time to consummate a gambling transaction.

To the extent, if at all, that the foregoing facts are not distinguishable from the *Price* case, this Court declines to follow the same.

The facts here are based upon the affiant's personal knowledge and from his own observation. They are not from an "informant" or otherwise hearsay.

As the Supreme Court stated in *United States* v. *Ventresca*, 380 U.S. 102, at p. 108 (1965):

> "These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

Proof of "probable cause" does not, in this Court's view, mean proof "beyond a reasonable doubt" nor does it mean

proof by a "preponderance of the evidence". It merely means that a rational person may conclude from the facts and the reasonable inferences that may be drawn therefrom, that a crime is being committed on the premises as to which a search warrant is being sought.

Here it was certainly reasonable for the State Court Justice to infer that a crime was being committed at 152—29th Street, Apartment 4B. Given the above facts, this Court might well have considered it unreasonable if the Justice had concluded otherwise. We cannot avoid the observation that a "substantial basis" for the Justice's finding existed, and it will therefore be upheld, *Jones* v. *United States*, 362 U.S. 257, 271 (1960); *United States ex rel. Rogers* v. *Warden of Attica State Prison*, 381 F.2d 209, 215-16 (2d Cir. 1967).

Accordingly, petitioner's application for a writ of habeas corpus must be and the same hereby is denied.

So Ordered.

Thomas C. Platt
U.S.D.J.

APPENDIX "G"

Amendment to Memorandum and Order dated March 10, 1974 and Order Denying Application for Certificate of Probable Cause dated March 29, 1976

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

76 C 160

JOSE SANTIAGO,

Petitioner,

—against—

SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY and BENJAMIN J. MALCOLM, Commissioner, New York City Department of Correction,

Respondents.

March 29, 1976

PLATT, *D.J.*

The Court hereby amends the penultimate paragraph of its Order herein dated March 10, 1976 to read as follows:

> "Here it was certainly reasonable for the State Court Judge to infer that a crime was being committed at 152--29th Street, Apartment 4B. Given the above facts, this Court might well have considered it unreasonable if the Judge had concluded otherwise. We cannot avoid the observation that a 'substantial basis' for the Judge's finding existed, and it will therefore be upheld, *Jones* v. *United States*, 362 U.S. 257, 271 (1969); *United*

Appendix "G"—Amendment to Memorandum and Order dated March 10, 1974 and Order Denying Application for Certificate of Probable Cause dated March 29, 1976

> *States ex rel. Rogers* v. *Warden of Attica State Prison*, 381 F.2d 209, 215-16 (2d Cir. 1967)."

Defendant has applied for a Certificate of Probable Cause with respect to this Court's Memorandum and Order dated March 10, 1976, denying petitioner's application for a writ of habeas corpus. Specifically, defendant appears to object to the inference which this Court felt that the judge of the Criminal Court of the City of New York could reasonably have drawn from the facts set forth in the affidavit of Patrolman Triglianos that

> "In this case on four separate occasions the petitioner was observed by a Police Officer to *have* returned to his place of residence after conducting a gambling transaction." (Emphasis added.)

Not only was such conclusion an inference which might reasonably be drawn from the facts set forth in said affidavit but Patrolman Triglianos specifically drew such conclusion in his affidavit when he stated that "after said transactions subject would go to premises 152—29th Street, Brooklyn, and enter Apartment #4B".

For the reasons indicated in this Court's Memorandum and Order dated March 10, 1976, as above amended, petitioner's application for a Certificate of Probable Cause must be and the same hereby is denied.

SO ORDERED.

THOMAS C. PLATT
U.S.D.J.

APPENDIX "H"

Order of United States Court of Appeals dated April 2, 1976

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 28th day of April, one thousand nine hundred and seventy-six.

JOSE SANTIAGO,

Petitioner-Appellant,

—v.—

SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY, and BENJAMIN J. MALCOLM, Commissioner, New York City Department of Correction,

Respondent-Appellee.

It is hereby ordered that the motion made herein by counsel for the petitioner by notice of motion dated April 1, 1976 for a certificate of probable cause, be and it hereby is denied.

It is further ordered that

(Signed) Leonard P. Moore
Leonard P. Moore

(Signed) Wilfred Feinberg
Wilfred Feinberg

(Signed) Murray I. Gurfein
Murray I. Gurfein
Circuit Judges

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-114

JOSE SANTIAGO,

Petitioner,

v.

SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY, and BENJAMIN J. MALCOLM, Commissioner, New York City Department of Correction,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EUGENE GOLD
District Attorney, Kings County
Attorney for Respondent
400 Municipal Building
Brooklyn, New York 11201
(212) 643-5100

ELLIOTT SCHULDER
Assistant District Attorney
Of Counsel

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-114

JOSE SANTIAGO,

Petitioner,

v.

SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY, AND BENJAMIN J. MALCOLM, COMMISSIONER, NEW YORK CITY DEPARTMENT OF CORRECTION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department (Petitioner's Appendix "E"), is reported at 49 App. Div. 2d 928, 374 N.Y.S. 2d 40 (2d Dept. 1975). The Memorandum and Order of the United States District Court for the Eastern District of New York (Petitioner's Appendix "F"), and the Amendment to Memorandum and Order dated March 10, 1976 and Memorandum and Order Denying Application for Certificate of Probable Cause (Petitioner's Appendix "G"), are reported at 411 F. Supp. 73 (E.D.N.Y. 1976).

Questions Presented

1. Whether the Supreme Court possesses jurisdiction to issue a writ of certiorari to the Court of Appeals to review the denial of a motion for a certificate of probable cause.

2. Whether a state prisoner who has been afforded by the state courts the opportunity for full and fair litigation of a Fourth Amendment claim may advance his claim again on federal habeas corpus review.

3. Whether the police officer's affidavit furnished probable cause for the issuance of the instant search warrant.

Statement of the Case

Petitioner was indicted by a Kings County, New York, grand jury for the crimes of Promoting Gambling in the First Degree, Possession of Gambling Records in the First Degree, Criminal Possession of Forged Instruments in the Second Degree, and Possession of Weapons and Dangerous Instruments and Appliances, as a felony (in one count) and as a misdemeanor (in another count).

The charges stemmed from the seizure of certain property by police officers while executing a search warrant* on May 26, 1972, inside apartment 4B at 152-29th Street, Brooklyn, New York.

Pursuant to Petitioner's motion to controvert the search warrant and to suppress the evidence seized, a hearing was held on January 3, 1974, in the Supreme Court of the State of New York, Kings County, before Hon. William T. Cowin.

* The search warrant, the supporting affidavit and the return are contained in Petitioner's Appendices "A", "B" and "C", respectively.

Subsequent to the conclusion of the hearing, Petitioner's motion was denied by Justice Cowin in a written opinion (Petitioner's Appendix "D"). Thereafter, on April 5, 1974, Petitioner pleaded guilty to the crime of possession of a weapon as a felony, and he was sentenced, on May 23, 1974, to imprisonment for a term of six months. Execution of sentence was stayed pending appeal, and Petitioner remains free on $5,000.00 bail, upon Respondents' consent, pending disposition of the within petition.

Petitioner appealed the above judgment of conviction to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department. The primary contention raised by Petitioner concerned the sufficiency of the affidavit underlying the search warrant. Petitioner also asserted that the Trial Court improperly considered the hearing testimony in reaching the conclusion that the search warrant was issued upon probable cause. In response to the latter claim, the District Attorney concurred that the propriety of the search could be tested solely on the sufficiency of the supporting affidavit. In unanimously affirming the judgment of conviction, the Appellate Division found the affidavit alone sufficient to establish probable cause (Petitioner's Appendix "E").

Petitioner's application for leave to appeal to the New York Court of Appeals was denied by Hon. Charles D. Breitel, Chief Judge of that court, on November 11, 1975.

Petitioner next applied to the United States District Court for the Eastern District of New York for a writ of habeas corpus. After hearing argument, Hon. Thomas C. Platt denied Petitioner's application in a Memorandum and Order issued on March 10, 1976 (Petitioner's Appendix "F").

On March 29, 1976, the District Court denied Petitioner's application for a certificate of probable cause, sought pursuant to 28 U.S.C. § 2253, and F.R.A.P. Rule 22(b) to permit Petitioner to appeal to the United States Court of Appeals from the District Court's order denying his application for a writ of habeas corpus (Petitioner's Appendix "G").

On April 28, 1976, Petitioner's further application for a certificate of probable cause was denied by the United States Court of Appeals for the Second Circuit (Petitioner's Appendix "H").

REASONS FOR DENYING THE WRIT

POINT I

The Supreme Court is without jurisdiction to issue a Writ of Certiorari to the Court of Appeals to review the denial of a motion for a Certificate of Probable Cause.

Although learned counsel for Petitioner has neglected to address the issue, a serious question exists, in our view, whether this Court possesses the requisite jurisdiction to issue a writ of certiorari under the present circumstances.

The statute upon which Petitioner relies to invoke the jurisdiction of this Court provides that a writ of certiorari may be issued by the Supreme Court in order to review "[c]ases in the courts of appeals", 28 U.S.C. § 1254. Clearly, this case was never "in" the Court of Appeals, within the meaning of the statute, for want of a certificate of probable cause. Hence, a writ of certiorari cannot be issued herein. See, *House* v. *Mayo,* 324 U.S. 42, 44 (1945).

While, in the *House* case, this Court assumed jurisdiction, by way of certiorari, pursuant to former 28 U.S.C.

§ 377 (currently 28 U.S.C. § 1651 [a]), it is our respectful submission that such a patently circular approach should not be followed in the instant matter. It should be noted that 28 U.S.C. § 1651(a) does not expand the jurisdiction of the Supreme Court; rather, the statute merely grants the Court the authority to issue all writs necessary to carry out its already existing jurisdiction. Since, as argued above, the requisite jurisdiction to issue a writ of certiorari is absent under 28 U.S.C. § 1254(1), it is similarly non-existent under 28 U.S.C. § 1651(a). In any event, we note that Petitioner does not even seek to rely on the latter statute, and, therefore, he should not be entitled to its benefit.

Moreover, the determination of the Court of Appeals to deny Petitioner's application for a certificate of probable cause was well within the limits of that court's discretion and should not be subject to review. As this Court declared in a different context in *In Re Burwell,* 350 U.S. 521, 522 (1956):

> It is not for [the Supreme] Court to prescribe how the discretion vested in a Court of Appeals, acting under 28 U.S.C. § 2253 [providing for certificates of probable cause], should be exercised, [citation omitted]. As long as that court keeps within the bounds of judicial discretion, its action is not reviewable.

POINT II

Where a state prisoner has been afforded an opportunity for full and fair litigation of a Fourth Amendment claim, he may not advance his claim again in a Federal Habeas Corpus Proceeding.

Even assuming that jurisdiction exists for the issuance of a writ of certiorari to the Court of Appeals, by seeking

review of a federal habeas application which raised a Fourth Amendment claim previously litigated in the state courts, Petitioner seemingly has ignored the recent mandate of this Court foreclosing such review.

In *Stone* v. *Powell,* and *Wolff* v. *Rice,* U.S. , 96 S.Ct. , 44 U.S.L.W. 5313 (decided July 6, 1976), it was held that federal habeas corpus relief is not available to state prisoners attempting to raise Fourth Amendment claims which have received full and fair consideration in the state courts.

The case at bar unquestionably comes within the holding of the above-cited cases. Here, as in *Wolff* v. *Rice, supra,* the state prisoner's detention emanated from the seizure of certain property pursuant to a search warrant.* Furthermore, the validity of the search and seizure effectuated herein was fully and fairly determined, in the state appellate court, solely on the sufficiency of the warrant (See Petitioner's Appendix "E").**

Consequently, it is respectfully submitted that the ruling in *Stone* v. *Powell* and *Wolff* v. *Rice* compels a similar result herein.

POINT III

The Supporting Affidavit provided probable cause for the issuance of the search warrant.

Turning to the merits of the Petition, this case does not present a substantial issue worthy of this Court's review, as the information in the police officer's affidavit (Petitioner's Appendix "B") established probable cause for a residential search.

---

* As Mr. Chief Justice Burger noted in his concurring opinion, "[T]he 'sanction' [imposed by the exclusionary rule] is particularly indirect when . . . the police go before a magistrate, who issues a warrant." 44 U.S.L.W. at 5322.

** Since the state appellate court made its determination on the basis of the warrant alone, it is immaterial whether the Trial Court may have considered the hearing testimony together with the affidavit in concluding that probable cause existed, as Petitioner claims on page 3 of his Petition.

Petitioner was observed by the officer on four proximate dates engaging, on a regular, ongoing basis, in what can only be described as "typical gambling activities." See, *People* v. *Valentine,* 17 N.Y. 2d 128, 269 N.Y.S. 2d 111, 216 N.E. 2d 321 (1967). Accordingly, there is no dispute between the parties concerning the fact that probable cause existed to believe that Petitioner was violating the state gambling laws.

The essential issue presented is whether a sufficient nexus was established between Petitioner's gambling operation and the subject premises. In this regard, Petitioner was seen on one date returning to the premises at 152-29th Street after engaging in a gambling transaction. The officer had previously observed Petitioner entering apartment 4B in the said premises. On other occasions, Petitioner's automobile had been observed parked in the vicinity of the said premises after similar gambling transactions had taken place. Furthermore, on still another date, Petitioner had been seen, during the hours in which such transactions regularly occurred, leaving apartment 4B at the said premises, and later returning to the apartment to be met by a known participant in the gambling activity. Clearly, the affidavit supplied sufficient facts "to warrant a man of reasonable caution to believe that the articles sought" [i.e., evidence of Petitioner's gambling enterprise] could be found at the premises. *United States* v. *Rahn,* 511 F.2d 290, 293 (10th Cir.), *cert. denied* 423 U.S. 825 (1975).

It is noteworthy that, in numerous cases, the courts have upheld warrant-authorized searches although the nexus between the illegal conduct and the places searched rested, not solely upon direct observation of criminal activity occurring on the premises, but on various other relevant considerations. Among the factors placed in the probable cause balance are the nature of the crime, the suspect's

degree of involvement in the criminal enterprise, the place of occurrence (either in or near the residence to be searched), the suspect's movements after the commission of the crime, the extent of opportunity for concealment, and normal inferences to be drawn as to where a criminal would be likely to conceal the items sought. See, *United States v. Lucarz,* 430 F.2d 1051, 1055 (9th Cir. 1970); *United States* v. *Mulligan,* 488 F.2d 732 (9th Cir. 1973), *cert. denied* 417 U.S. 930 (1974); *United States v. Teller,* 412 F.2d 374 (7th Cir. 1969), *cert. denied* 402 U.S. 949 (1971); *Porter v. United States,* 335 F.2d 602 (9th Cir. 1964), *cert. denied* 379 U.S. 983 (1965). When these factors are applied to the circumstances at bar, Petitioner's deep involvement in the gambling enterprise, and his pattern of movement to and from the subject premises establish an undisputable connection between the criminal activity and the place to be searched.

This case is very similar, on its facts, to *People* v. *Coscia,* 26 App. Div. 2d 649, 272 N.Y.S. 2d 416 (2d Dept. 1966), where the court upheld a warrant authorizing a residence search based upon a police officer's observations of the defendant engaging in gambling activities (almost identical to those of Petitioner), after which the defendant returned to his residence. Five minutes later, an unknown male met the defendant at the latter's house and received from him a packet of paper. Even though there was no evidence connecting the packet to the earlier gambling activities, the court held that the defendant's criminal conduct had extended to his home. Similarly, in the instant matter, Petitioner was traced back to the premises after one gambling transaction. His automobile was seen in the vicinity of the premises on three other occasions after the completion of similar transactions. He was known to frequent the subject apartment and was followed into said

apartment on one occasion by a known participant in the gambling activity, who as the District Court found, remained in the apartment for a sufficient length of time (five minutes) to have conducted a gambling transaction.

Petitioner's reliance on *United States* v. *Price,* 149 F. Supp. 707 (D.C.D.C. 1957) is misplaced. There, no direct connection was shown between the premises to be searched and the gambling activity. Here, as previously noted, such direct connection was clearly established.

To conclude, when tested in a realistic and common-sense manner, the officer's affidavit provided probable cause to believe that evidence of Petitioner's gambling activities was being concealed in the subject premises.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Brooklyn, New York
August, 1976

Respectfully submitted,

EUGENE GOLD
District Attorney
Kings County

ELLIOTT SCHULDER
Assistant District Attorney
of Counsel